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No. 1336

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE DELONEY AND HARRIET DELONEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD FEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1236

GEORGE DELONEY AND HARRIET DELONEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1968. A petition for rehearing was denied on February 14, 1968. On March 15, 1968, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a delay of less than six months between the date of violation and the arrest constitutes denial of a speedy trial.

296-974—68

STATEMENT

After a jury trial in the Northern District of Illinois, petitioners were convicted on each count of a four-count indictment which charged illegal sales and transportations of narcotic drugs (26 U.S.C. 4705(a), and 21 U.S.C. 174) on two separate occasions, March 23, and April 7, 1965. On November 15, 1966, each petitioner was sentenced to concurrent sentences of imprisonment for fifteen years.

The evidence at trial showed that Mrs. Jones, a government informer who had known petitioners for fifteen years, was advised by petitioner Mrs. Harriet Deloney that she had heroin for sale (R. 17, 34, 49, 53, 101). On each of the dates charged, the informant, with Narcotic Agent Jackson listening in, called Mrs. Deloney and then went to the Deloney apartment with the agent posing as her "guy." (R. 74, 121, 29, 128). On March 23, the agent gave $300 to Mrs. Deloney who turned the money over to her husband, petitioner George Deloney (R. 22, 122). He left the apartment. After he telephoned, Mrs. Deloney told the agent where to get the "stuff" (R. 25, 123, 125). On April 7, 1965, the agent gave $300 to Mr. Deloney (R. 29). He then told them to return to the informant's home and wait. After receiving a telephone call from the wife (R. 30), they returned to the Deloney apartment where delivery was made (R. 31, 131).

Both petitioners testified that they had never sold drugs to Agent Jackson (R. 293, 328) and that the first time they saw him was when he arrested them in September 1965 (R. 288, 320). Both said Mrs.

Jones had visited them in March or April 1965 and asked them to sell her drugs (R. 291, 305, 323–325), but they had heard that she was an informer and refused to furnish her with narcotics (R. 306, 393, 325).

Petitioners were arrested on September 14, 1965 and indicted on September 23rd. Their motion to dismiss the indictment because of the period of delay from time of the offense (April, 1965) to the date of arrest was denied by the district court, subject to reconsideration at trial, if the defendants could show that they had been prejudiced by the delay. The court of appeals affirmed.

ARGUMENT

Petitioners were not entitled to have the indictment dismissed on a mere showing of a six month interval between offense and arrest. This Court has observed that, where there has been pre-arrest delay, the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell,* 383 U.S. 116, 122. There is substantial support for the view that the protection of the Sixth Amendment, like that of Rule 48(b), F.R. Crim. P., is addressed exclusively to the post-arrest situation. See, e.g. *Nickens* v. *United States,* 323 F. 2d 808 (C.A.D.C.); *Harlow* v. *United States,* 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Foley* v. *United States,* 290 F. 2d 562 (C.A. 8), certiorari denied, 368 U.S. 888. At all events, there is no support for the view that a defendant may assert pre-arrest delay as a bar to a prosecution commenced within the applicable period

of limitations without demonstrating that he has been materially prejudiced thereby. See Memorandum for the United States in Opposition, *Feinberg* v. *United States,* No. 854, this Term, certiorari denied January 15, 1968. As this Court noted in disposing of a claimed right to swift arrest in *Hoffa* v. *United States,* 385 U.S. 293, 310: "There is no constitutional right to be arrested." Hence, without some showing of prejudice to the defense, there is no reason why the government should be called upon to explain, nor a court required to consider, whether an indictment brought within the applicable limitations period could or should have been brought sooner.

Petitioners' argument that an earlier arrest and indictment would have permitted the preservation of defenses (Pet. 10), is not supported by the specification of any possible defense that was lost by the delay and is refuted by their own testimony at trial. Petitioners denied categorically that Agent Jackson had been in their apartment and recalled comprehensively their version of their conversations with Mrs. Jones and their refusal to sell her drugs. *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.), relied on by petitioners, is distinguishable. There, the defendant asserted a lack of memory as to his whereabouts when he allegedly violated the law, and the buying agent had no personal recollection of his dealings with the defendant and had to rely on notes made months earlier. The dangers evident in such a factual situation, involving lack of memory and difficulties of cross-examination, are not present here. Petitioners did not show any diminution of memory and the

agent, who testified from personal recollection, was corroborated by the informant, as well as, by a surveilling agent who observed part of each incident.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

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